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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MAXIMILLIAN KLEIN, *et al.*,

Plaintiffs,

v.

FACEBOOK, INC.,

Defendant.

Case No. 20-cv-08570-LHK

**CONSUMER PLAINTIFFS' RESPONSE
TO DEFENDANT FACEBOOK, INC.'S
ADMINISTRATIVE MOTION FOR
CLARIFICATION OF ORDERS
CONSOLIDATING *LOVELAND* AND
ROSENMAN WITH *KLEIN***

Judge: Hon. Lucy H. Koh

I. INTRODUCTION

Pursuant to N.D. Cal. Civil L.R. 7-11(b), Consumer Plaintiffs provide the following response to Facebook’s Administrative Motion for Clarification, ECF No. 190 (“Mot.”). Facebook seeks an order requiring “the plaintiffs in *Rosenman* and *Loveland* [to] elect to either (1) be added through amendment as named plaintiffs on that complaint, with any appropriate modifications to the interim class structure that the Court sees fit to impose, or (2) [to] voluntarily dismiss their complaints and participate in the case as absent class members.” *Id.* at 2. While styled as seeking “clarification” of the contours of the consolidated case structure, Facebook’s motion is a motion to dismiss the *Rosenman* and *Loveland* cases and an improper attempt to control Consumer Plaintiffs’ complaint and to revisit and undermine the very purpose of the lead counsel and consolidated complaint procedures previously ordered by the Court. Neither the case law nor the Court’s prior consolidation orders support the outcomes that Facebook seeks in its motion. Consistent with Ninth Circuit and other precedent, a stay of these other matters is proper and prudent at this time. The Court should exercise its discretion and reject Facebook’s requests.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 42(a) generally governs consolidation. The Court has broad discretion to consolidate cases under Rule 42.¹ “[The] objective is to give the district court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties.”² In *Hall v. Hall*, the Supreme Court recently traced the entire “legal lineage” of consolidation from its roots in English common law and the first federal consolidation statute in 1813 through the modern version of Federal Rule of Civil Procedure 42. 138 S. Ct. 1118, 1125–31 (2018). As the Supreme Court explained, consolidation has always been interpreted “to mean the joining together—but not the complete merger—of constituent cases” such that the consolidated actions remain “separate, independent”

¹ See, e.g., *Miami Police Relief & Pension Fund v. Fusion-io, Inc.*, No. 13-cv-05368-LHK, 2014 WL 2604991, at *2 (N.D. Cal. June 10, 2014) (collecting cases).

² 9A Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2381 (3d ed.); *Berg v. Guthart*, No. 5:14-CV-00515-EJD, 2014 WL 3749780, at *1 (N.D. Cal. July 30, 2014).

actions. *Id.* at 1131. The Supreme Court was unambiguous: “[t]he history against which Rule 42(a) was adopted resolves any ambiguity . . . one of multiple cases consolidated under the Rule retains its independent character, . . . regardless of any ongoing proceedings in the other cases.” *Id.* at 1125. Consolidation is meant to “enabl[e] more efficient case management while preserving the distinct identities of the cases and the rights of the separate parties in them.” *Id.* It does not, as Facebook misstates, allow for or require that all individual cases be merged, for all purposes, into one action.

III. ARGUMENT

The Rosenman and Loveland Plaintiffs May Not “Elect” to Become Named Consumer Plaintiffs. Facebook states that “the plaintiffs in *Rosenman* and *Loveland* may elect . . . to be added through amendment as named plaintiffs” to the Consolidated Consumer Class Action Complaint. Mot. at 2. But Facebook cites no authority for its assertion that a plaintiff in a later-filed case may unilaterally “elect” to become a “named plaintiff” in an earlier-filed, pending action where leadership has already been appointed for the putative class and a consolidated complaint for that class (identifying class representatives) has already been filed. Nor would such a result be consistent with Rule 23(g)(2)(A), the purpose of which is to ensure “efficient case management” of putative class actions by allowing courts to appoint interim class counsel and empower that counsel to make decisions on behalf of the putative class.³ Facebook’s request would undermine these goals and mean that any plaintiff that files a case after leadership has already been appointed could unilaterally join the counsel and class representatives leading the putative class.

Here, the Court has appointed separate leadership counsel for each of the putative Consumer and Advertiser Classes, and also limited the number of firms serving as leadership counsel.⁴ *See* ECF Nos. 73, 74. The Court then ordered those counsel to file one consolidated complaint for each putative

³ *In re Air Cargo Shipping Servs. Antitrust Litig.*, 240 F.R.D. 56, 57 (E.D.N.Y. 2006); *see also* Federal Judicial Center, *Manual for Complex Litigation* (4th ed.), § 21.11 at 246–47; 7B Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 1802.3 (3d ed.).

⁴ Facebook states that the Court ordered consolidation “without limitation[.]” Mot. at 4. Facebook’s statement is incorrect. The Court specifically appointed separate leadership counsel for the putative Consumer and Advertiser Classes and authorized the filing of separate consolidated complaints for each class. ECF. No. 74 at 2. Leadership for each class then filed their respective complaints, which feature different factual allegations and legal claims and theories. *See* ECF Nos. 86, 87.

1 class. *Id.* The Consolidated Consumer Class Action Complaint (ECF No. 87) is that pleading for the
 2 putative Consumer Class, and it does not name the *Rosenman* or *Loveland* plaintiffs as named
 3 representatives of the putative Consumer Class. Despite Facebook’s efforts to undermine these orders
 4 and events, the Court should deny Facebook’s request for an order authorizing the *Rosenman* and
 5 *Loveland* plaintiffs to “elect” to become named Consumer Plaintiffs.

6 **The *Rosenman* and *Loveland* Cases Need Not Be Dismissed.** Facebook also states that if the
 7 *Rosenman* and *Loveland* plaintiffs do not “elect” to become named Consumer Plaintiffs, they
 8 otherwise “must dismiss their claims[.]” Mot. at 5. Dismissal of those cases is not required. Courts
 9 regularly authorize the stay of later-filed class cases pending the resolution of earlier-filed ones, and a
 10 stay (rather than dismissal) of the *Rosenman* and *Loveland* actions is prudent here.

11 The Court’s prior orders relating and consolidating the various actions do not require the
 12 dismissal outcome that Facebook requests here. The Seventh Circuit has explained the nature of
 13 overlapping class actions as follows:

14 Parallel cases often seek the same relief. There’s nothing peculiar about
 15 class actions. Sometimes the same plaintiff will file in two courts;
 16 sometimes different plaintiffs will seek equivalent relief in the same
 17 court. Our situation has a little of each, since [Plaintiffs] are not the same
 person, but they are in the same class. **No mechanical rule governs the
 handling of overlapping cases. Judges sometimes stay proceedings
 in the more recently filed case** to allow the first to proceed[.]

18 *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 838 (7th Cir. 1999) (emphases added) (internal
 19 citation omitted). Consistent with these principles, courts often stay (rather than dismiss) later-filed,
 20 overlapping cases.⁵ These principles are “not limited to cases brought in different districts.”⁶ Instead,

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 25 ⁵ See, e.g., *Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36, 42 (N.D. Cal. 2020) (“Whether to stay a
 26 proposed class action based on the pendency of an overlapping class action in another court is a matter
 27 of judicial discretion.”); *Clardy v. Pinnacle Foods Grp., LLC*, No. 16-cv-04385-JST, 2017 WL 57310,
 at *3 (N.D. Cal. Jan. 5, 2017) (“[T]he district court may exercise its discretion to dismiss a duplicative
 later-filed action, to stay that action pending resolution of the previously filed action, to enjoin the
 parties from proceeding with it, or to consolidate both actions.”).

28 ⁶ *Wallerstein v. Dole Fresh Vegetables, Inc.*, 967 F. Supp. 2d 1289, 1294 (N.D. Cal. 2013).

1 courts may stay later-filed, overlapping class actions where an earlier-filed class case is already
 2 pending before the same court.⁷

3 The benefits of a stay over dismissal are clear: dismissal may prejudice the parties and trigger
 4 additional issues, such as questions of tolling and the filing of a notice of appeal. As the Ninth Circuit
 5 explained in *Alltrade, Inc. v. Uniweld Prod., Inc.*, when considering the proper management of
 6 overlapping actions pending in different fora, “why take chances? **It is simpler just to stay the second**
 7 **suit.**”⁸ These principles also apply where a court is considering whether to stay or dismiss a later-filed
 8 class action that overlaps with an earlier-one already pending before it.⁹

9 This Court has substantial discretion in determining what happens to the *Loveland* and
 10 *Rosenman* actions moving forward.¹⁰ In other instances, the Court appears to have authorized stays of
 11 later-filed class actions.¹¹ Here, as Facebook acknowledges, “[t]he Court consolidated 11 similar
 12 cases[.]” Mot. at 5. However, the join-or-dismissal remedy Facebook now seeks has not occurred in
 13 any of the other individual cases consolidated here: while two actions were closed, they were
 14 voluntarily dismissed.

18 ⁷ See, e.g., *Guill v. All. Res. Partners, L.P.*, No. 16-cv-0424-NJR-DGW, 2017 WL 1132613, at *2–
 19 3 (S.D. Ill. Mar. 27, 2017) (concluding that “stay, rather than dismissal, is appropriate” as to later-filed
 class action pending before same court as earlier-filed action).

20 ⁸ *Alltrade, Inc. v. Uniweld Prod., Inc.*, 946 F.2d 622, 629 (9th Cir. 1991) (emphasis added) (internal
 21 citation omitted); see also *Chavez v. Dole Food Co., Inc.*, 836 F.3d 205, 218 n.57 (3d Cir. 2016) (“even
 22 when prudence calls for putting a redundant suit on hold, it must be stayed rather than dismissed unless
 there is no possibility of prejudice to the plaintiff.”) (internal citation omitted).

23 ⁹ See, e.g., *Guill*, 2017 WL 1132613, at *3 (staying, rather than dismissing, later-filed class action
 24 where overlapping, earlier-filed class action already pending before court because “[i]nvolving such a
 stay will avoid the inherent inefficiencies involved with duplicative litigation, will reduce the burden
 of litigation on the parties and the Court, and will not cause undue prejudice.”).

25 ¹⁰ See, e.g., *Investors Rsch. Co. v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 877 F.2d 777, 777 (9th Cir.
 26 1989); William B. Rubenstein, 3 *Newberg on Class Actions* § 10:35 (5th ed.), Consolidation of Related
 Actions Pending In Same Federal District (“Consolidated cases retain their separate individual identity
 although courts may order the parties to file a consolidated complaint.”).

27 ¹¹ Cf. *In re Zoom Video Commc’ns, Inc. Privacy Litig.*, Case No. 5:20-cv-02155-LHK, ECF No.
 28 62 at 8–9 (N.D. Cal. Mar. 11, 2021) (entering a stipulation providing that a defendant need not answer
 a future, related complaint and can instead treat a consolidated complaint as operative).

None of Facebook’s cited cases provide support for—nor even opine on—its dismissal request.¹² In *Cameron v. Apple, Inc.*—a case upon which Facebook’s motion relies—the order consolidating cases does not require dismissal of later-filed actions. *See* No. 4:19-cv-03796-YGR, (N.D. Cal. Nov. 5, 2019), ECF No. 47. Instead, the *Cameron* order provides that with respect to “[e]ach new case arising out of the subject matter of the Consolidated Developer Action,” “defendant shall not be required to answer, plead, or otherwise move with respect to that complaint” absent court order. *Id.* Put differently, in contemplating that a defendant need not answer or otherwise move, *Cameron* confirms that courts may *stay* later-filed actions that are consolidated into an existing class action.¹³

Pursuant to the Court’s instructions (ECF No. 74), Consumer Class Counsel filed a consolidated pleading (ECF No. 87). That pleading does not name the *Loveland* and *Rosenman* plaintiffs as representatives of the putative Consumer Class. Therefore, they are not named plaintiffs for purposes of the consolidated Consumer action; they are instead absent class members. Facebook complains that “[i]f left unchecked, the *Rosenman and Loveland*” plaintiffs “would increase duplication, hinder pretrial proceedings, foster confusion among absent class members, and multiply the expenditure of time and money for all parties.” Mot. at 5. A stay of those actions, however, would achieve the benefits that Facebook purports to seek with none of the possible prejudice attendant to dismissal.

IV. CONCLUSION

For the foregoing reasons, Consumer Plaintiffs respectfully submit that: (1) the *Rosenman* and *Loveland* plaintiffs may not “elect” to become named Consumer Plaintiffs in the pending *Klein* action; and (2) the *Rosenman* and *Loveland* actions need not be dismissed at this time. Lead counsel for the Consumer Plaintiffs has conferred with counsel for Plaintiff *Rosenman*, and Plaintiff *Rosenman* concurs with this Response.

¹² *See Chacanaca v. Quaker Oats Co.*, No. 10-cv-0502 RS, 2011 WL 13141425, at *2 (N.D. Cal. June 14, 2011) (not discussing any requirement to dismiss later-filed consolidated actions); *Ramirez v. HB USA Holdings, Inc.*, Case No. 20-cv-1016-JGB-SHK, 2021 WL 840353, at *2 (C.D. Cal. Jan. 15, 2021) (same); *Takeda v. Turbodyne Techs., Inc.*, 67 F. Supp. 2d 1129, 1133 (C.D. Cal. 1999) (same).

¹³ The *Cameron* order cited in Facebook’s motion was the product of an agreed-upon stipulation between the parties in that action.

1 DATED: November 15, 2021

Respectfully submitted,

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ATTESTATION OF SHANA E. SCARLETT

This document is being filed through the Electronic Case Filing (ECF) system by attorney Shana E. Scarlett. By her signature, Shana E. Scarlett attests that she has obtained concurrence in the filing of this document from each of the attorneys identified on the caption page and in the above signature block.

Dated: November 15, 2021

By /s/ Shana E. Scarlett
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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, the foregoing document was transmitted to the Clerk's Office using the CM/ECF System, causing the document to be electronically served on all attorneys of record.

Dated: November 15, 2021

By /s/ Shana E. Scarlett
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